Supreme Court, U.S.
FILED
06-149 JUL 21 2006
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

CLAUDE NELSON STUART,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether New York's Judiciary Law §90(2, 3, 6, 7, 8, and 9) relating to the discipline of attorneys, as applied, is violative of equal protection and due process when it permits, without a rational basis:

(1) one Department of a single court by rule to deny attorneys substantive and procedural rights accorded to other attorneys in another Department of the same court, and further,

(2) the enforcement of court rules which deny all attorneys substantive and procedural rights which the State Education Law accords to professionals such as doctors and dentists?

B. Whether the failure to afford attorneys the right to appeal from the ruling of the Appellate Division, the court of first instance, offends due process?

* * *

There is absolutely no justification why members of the bar who have been in the forefront of forging the protection of rights of others, should themselves find that they are being deprived of equal protection and due process.

PARTIES TO THE PROCEEDING

This petition is filed on behalf of *Claude Nelson Stuart*, an assistant district attorney, Queens County, New York, who was suspended for a period of three years commencing on October 26, 2005 by Order of the Court below.

The Respondent, though not named, is Gail A. Prudenti, as Presiding Justice, Supreme Court of the State of New York, Appellate Division, Second Department.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

TABLE OF APPENDICES viii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

A. Introduction 1

B. Facts and Procedural History 7

REASON FOR GRANTING THE PETITION. 11

CONCLUSION 17

TABLE OF CITED AUTHORITIES

NEW YORK STATE CONSTITUTION

Article VI 1

FEDERAL STATUTES

28 U.S.C. §1257(a) 1

SUPREME COURT CASES

***Bradley v. Fisher*, 80 US 335 (1872)** 12

***Brady v. Maryland*, 373 US 83 (1963)** 7,8

***Griffin v. Illinois*, 351 US 12, 18 (1956)** 17

***Herring v. New York*, 422 US 853 (1975)** 16

***In Re. Ruffalo*, 390 US 544 (1968)** 11,12

***Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 US 154 (1971)** 11

***Lindsley v. Natural Carbonic Gas Co.*, 220 US 61 (1911)** 15

***Middlesex County Ethics Committee v. Garden State Bar Association*, 457 US 423 (1982)** 9,10,12,16

FEDERAL CASES

Dyer v. Macdougall, 201 F.2d 265 (2nd Cir. 1952) 12

Erdman v. Stevens, 458 F.2d 1205, *Cert. denied*, 409 US 889 (1972) 12

In Re. Noell, 93 F.2d 5 (8th Cir. 1937) 11

United States v. Coppa, 267 F.3d 132 (2nd Cir. 2001) 7

STATE STATUTES

Civil Practice Law and Rules §5601(a). 3

Civil Practice Law and Rules, Article 78 9

New York Education Law §6510 8

New York Judiciary Law §90(2,3,6,7,8, and 9) 1,2,11

STATE CASES

Corwin v. Nyquist, 37 AD2d 656 (3rd Dept. 1971) 9,16

Erie County Water Authority v. Western New York Water Co., 304 N.Y. 342, 107 N.E.2d 479,cert. denied, 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 690 (1952) 2

LAW REVIEWS AND PRACTICE COMMENTARIES

ABA Center for Professional Responsibility, 1992 14

Caher, John, "State Bar Sidesteps Opening Discipline," N.Y.L.J. Jan. 28, 2002 13

Craco Committee Report 14

Lawyer Regulation for a New Century, ABA Center for Professional Responsibility, 1992 .....

Levin, Leslie C., "The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanction," 48 Am. U. L. Rev. 1 (October 1998) 14

Mangano, Guy James, "Attorney Discipline in Need of Change," N.Y.L.J. May 1, 2000 13

Moore, Nancy J., "Lawyer Ethics Code Drafting in the Twenty-First Century," 30 Hofstra L. Rev. 923 14

N.Y. Prof'l Resp. Rep., March 2002 13

New York State Bar Association Committee on Professional Discipline Report, The State of Discipline in New York 1992 14

New York State Bar Association Committee on Professional Discipline Reports 2001-2002, 2002-2003 14

Report of the Commission on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century* **14**

The Role of an Intermediate Appellate Court, 41 Bklyn L.Rev. 459, 463 (1975) **17**

Wechsler, Steven, "2001-2002 Survey of New York Law, Professional Responsibility" 53 Syracuse L. Rev. 737 ..... **13**

TABLE OF APPENDICES

Appendix A The Decision and Order of the New York State Court of Appeals denying leave to appeal, decided May 11, 2006 ..... A1

Appendix B The Opinion of the Appellate Division, Second Department, entered September 26, 2005 ..... A2

Appendix C The Opinion denying renewal and reargument and permission to appeal .. A6

Appendix D The Report of the Special Referee appointed by the Appellate Division, John P. Clarke, rendered on January 25, 2005 ..... A7

Appendix E Statutes and Rules A15

Appendix F Chart reflecting no violation of *Brady v. Maryland*, 373 US 83 (1963) A42

OPINIONS BELOW

The Decision and Order of the New York State Court of Appeals denying leave to appeal, decided May 11, 2006, is reproduced at Appendix A. The Opinion of the Appellate Division, Second Department, entered September 26, 2005 is reported at 22 AD3d 131 (2nd Dept., 2005) and is set forth in Appendix B. The Opinion denying renewal and reargument and permission to appeal is unreported, but reproduced as Appendix C. The Report of the Special Referee, John P. Clarke appointed by said Appellate Division was rendered on January 25, 2005, and is reproduced at Appendix D.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the New York State Court of Appeals pursuant to 28 U.S.C. 1257(a). The procedure for disciplining attorneys in New York State is contained in Judiciary Law §90(2, 3, 6, 7, 8, and 9). There is only one Appellate Division, as provided by the New York State Constitution, Article VI, divided into four Departments by geographical area.

STATEMENT OF THE CASE

A. Introduction

The basic statutory framework which underlies attorney disciplinary proceedings is New York Judiciary Law §90(2, 3, 6, 7, 8, and 9). Attorneys licensed to practice in this State are officers of the New York Supreme Court.

The statute contemplates that the Appellate Division shall have exclusive jurisdiction in their respective Judicial Departments to say what constitutes professional misconduct. *Erie County Water Authority v. Western New York Water Co.*, 304 N.Y. 342, 107 N.E.2d 479,cert. denied, 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 690 (1952). Suspension or removal of an attorney by any Appellate Division operates as a suspension or removal in every court of the State. N.Y. Judiciary Law §90(3).

The Appellate Division, as noted, is one court with four departments determined by geographic area. Each Department admits attorneys and under the disciplinary law has the power to disciplines attorneys within its jurisdiction (i.e. the First Department involves appeals from New York and Bronx Counties, and the Second Department is Kings, Queens, Richmond, Nassau, Suffolk, Westchester, and Dutchess Counties.

The Appellate Division of the Supreme Court in each of four departments receives complaints against individual members of the bar from bar associations or the Grievance Committee appointed and staffed by the Appellate Division. *From there, procedures vary in material fashion between the First and Second Departments without reason.*

<u>In the Second Department</u>, the Appellate Division refers the charges to a Special Referee who hears the matter and reports his/her findings on the facts. He is there to "hear and report." The parties then make motions before the Appellate Division to affirm or disaffirm the referee's report. The Appellate Division does not take new evidence or permit the opportunity for the attorney or his

representative to appear before the court. Following the Referee's report it may punish, including suspension from the practice of law.

The attorneys are not afforded a right of appeal as of right to the Court of Appeals. [1]

As noted, in the Second Department the attorney is afforded a hearing only before the appointed Special Referee. This is far different than for attorneys admitted in the First Department.

<u>In the First Department</u>, there is not only a hearing before a Special Referee, but following his/her findings the matter is reviewed, with oral argument permitted, before a Hearing Panel. If action is recommended in the First Department after these <u>two bodies</u> have reviewed the matter, then and only then is the matter brought before the court, except through briefing. However, in neither department is there *de novo* review by a court.

In short, there are two opportunities where the attorney can obtain relief in the First Department before the

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[1] New York Civil Practice Law and Rules §5601(a) provides an order is appealable as of right to the Court of Appeals, the State's highest Court, only where there is a dissent by two Justices on a question of law in favor of the Appellant. The posture of the dissent must be such as would turn the case the Appellant's way. An exception is made where a construction of the New York or Federal Constitution is directly involved, in which case even a unanimous decision is appealable as of right.

matter goes before the Appellate Division for final determination. In the Second Department, there is only the proceeding before the Special Referee prior to the matter going before the Appellate Division.

For ease of reference, we set forth below in tabular form the difference between the two departments.

[* - represents areas of difference between the First and Second Departments. Once again, petitioner was suspended in the Second Department]

The First Department	The Second Department
1. Office of Chief Counsel ("Counsel") investigates sua sponte or upon complaint. Notice sent to attorney requesting response.	1. Grievance Committee ("committee") investigates sua sponte or upon complaint.
2. Counsel Recommends to Disciplinary Committee ("committee") formal proceedings.	2. Committee or subcommittee thereof holds a hearing or upon a finding of probable cause and the public interest requires prompt action forthwith recommends to the Court the institution of a disciplinary proceeding. 691.4(e)(4), (5).
3. *A reviewing policy member of the committee reviews file and evidence and if approves the matter goes to court for approval of a formal	3. Once the matter is referred to the court for the institution of a disciplinary proceeding the court may

disciplinary proceeding. 605.12(f).	fix before whom matter will be heard.
4. Court issues an order referring the matter to a referee to hear and report. 605.13.	4. There is no right to move to reopen the proceedings before the referee, as is the practice in the First Department.
5. * If referee recommends sustaining any of the charges, he determines whether an inquiry as to sanction is required. After the sanction inquiry, the referee issues a report and recommendation regarding charges and sanction which is filed with the Counsel's Office.	5. There is no Hearing Panel review of the referee's report and recommendation as is the practice in the First Department.
6. * At any time prior to the filing of the referee's report and recommendation or prior to the hearing panel's determination the attorney can move to reopen the proceedings before either body.	

7. *Hearing Panel reviews all evidence, referee's report and recommendation, hears oral argument and briefs are submitted.	
8. *Hearing Panel makes a determination as to whether to confirm disaffirm or modify the referee's report and recommendation which is filed with the Court.	
9. Counsel files motion with Court to confirm, disaffirm or modify the Hearing Panel's recommendations.	

* * *

New York Courts have broad power over attorneys. It is a verity however, that the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected constitutional rights to equal protection and due process.

B. Facts and Procedural History

The petitioner was an Assistant District Attorney in Queens County for over 12 years, handling more than 70 felony trials. He served as a Captain in the United States Army JAG Corps. In May 2002, Petitioner was the prosecutor in *People v. Johnson* before a Justice of the Supreme Court. It is claimed that the petitioner violated his obligation under *Brady v. Maryland*, 373 US 83, but that clearly was not so, see *United States v. Coppa*, 267 F.3d 132 (2nd Cir. 2001). The statements made by the person were not exculpatory, for in the police interview she categorically denied requisite knowledge of the homicide. See Appendix F.

On or about June 4, 2002 the court questioned petitioner about the whereabouts of the person, and the petitioner replied that her whereabouts were not known even though she was last seen on May 31, 2002. Before the referee, the petitioner claimed that any misrepresentation to the court was not intended being the result of exhaustion by a family tragedy requiring him to fly back and forth to Belize in 26 hours to be ready for the resumption of trial.

The Special Referee found the absence of venality. See Appendix D. Without oral argument, and without observance of petitioner's demeanor, the Appellate Division found that the petitioner had failed to establish lack of venality, thereby shifting the burden of proof to petitioner, despite the finding of the Special Referee.

On petitioner's motion for renewal, reargument, and other relief he claimed that the court had denied him equal

protection and due process; misconstrued the *Brady* obligation; and without any hearing on the facts shifted the burden of proof as to the critical issue of venality. The Court in deciding the case on renewal and reargument did not discuss equal protection and due process, the *Brady* obligation, or the shifting of the burden of proof as to venality, but found that petitioner had given "false information to a Justice of the Supreme Court" and therefore denied all relief.

These issues involving questions of due process and equal protection, recited herein, including the construction of the *Brady* obligation, were duly presented to the Appellate Division and the Court of Appeals, the latter court denying review.

When a professional other than an attorney is cited for misconduct, the format pursuant to New York Education Law §6510 is: (1) the Department of Education investigates the complaint; (2) the results of the investigation are made available to a professional conduct officer designated by the Board of Regents; (3) if such officer, after consultation with a professional member of the applicable State Board determines there is substantial evidence of professional misconduct and further proceedings are warranted, then (4) an adversary hearing is commenced before a Hearing Panel. Testimony is taken, witnesses may be called, subpoenas issued, the parties may submit briefs, and the like. The Hearing Panel renders a report, and a copy of the report is made available to the Regents Review Committee where the licensee may again appear, present evidence, and make argument just as was done before the Hearing Panel. After the Regents' decision

is made the matter can be reviewed by Mandamus under Article 78 of the New York Civil Practice Law and Rules and be sustained if there be "substantial evidence." *Corwin v. Nyquist*, 37 AD2d 656 (3rd Dept. 1971).

These safeguards and levels of review for the professionals are in stark and unwarranted distinction from those granted to members of the Bar. On equal protection and due process grounds there can be no justification for the difference in treatment. For other professionals there is the opportunity for multiple appearances, arguments, and review. In the matter of all attorneys, there is no right of review from decision of the Court of original jurisdiction, except as referred to in footnote 1.

* * *

This court's decision in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 US 423 (1982) augers for review by this Court.

In that case, the Court denied relief since the attorney sought redress during an ongoing State proceeding and failed to present his constitutional challenges in the State disciplinary proceedings, though he had "abundant opportunity" to do so.

The New Jersey disciplinary procedure provides that if a local district ethics committee finds a *prima facie* case of unethical conduct, a formal hearing is held with witnesses sworn. If discipline is ordered, a statewid

disciplinary review board is appointed by the Supreme Court and it conducts a *de novo* review with oral argument.

(In New York, this second review, while present in the First Department in New York, is denied to attorneys who are admitted across the Brooklyn Bridge in the Second Department.)

In New Jersey, when the matter is found to warrant discipline, the recommendation is submitted to the Supreme Court which on all occasions reviews all decisions, permits briefing, and oral argument.

Justices Brennan and Marshall in *Middlesex* concurred, pointing out that the matter was ongoing in the State court and that Hinds, the attorney, had not raised a constitutional challenge before the New Jersey court. Justices Blackmun and Stevens also concurred, for it was unclear whether constitutional challenges had been dealt with on the merits in the court below and that there were ongoing judicial proceedings in which Hinds "has been given the opportunity to raise his constitutional challenge", which he failed to do.

In New Jersey, the attorney is afforded three avenues of review [district ethics committee, statewide disciplinary review board, and the State Supreme Court].

REASON FOR GRANTING THE PETITION

New York's disciplinary procedure §90(2) applicable to attorneys is constitutionally infirm because it permits, without a rational basis: (1) one Department of a single court to enforce rules denying attorneys substantive and procedural rights accorded to other attorneys solely because they were admitted in another Department of the same court, and (2) the enforcement of court rules which deny all attorneys substantive and procedural rights which the State Education Law accords to professionals such as doctors and dentists. In addition, the failure to afford attorneys the right to appeal from the ruling of the Appellate Division, the court of first instance, offends due process.

When a state seeks to discipline a lawyer it is required to proceed according to the most exacting requirements of due process. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 US 154, 174 (1971, Black and Douglas, JJ., dissenting). A State court's order of suspension of an attorney should not be recognized in federal court where the State procedure does not permit an adequate opportunity to be heard before the court, and otherwise thereby lacks due process. *In re Noell*, 93 F.2d 5 (8th Cir. 1937).

A determination of suspension may mean destruction of an attorney's reputation and livelihood and no doubt for this reason, the Supreme Court has characterized such proceedings as being of a quasi-criminal nature. *In re Ruffalo*, 390 US 544, 551 (1968). A court's disciplinary proceeding is "comparable to a criminal rather

than a civil proceeding . . . it cannot be disputed that for most attorneys a license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine." *Erdmann v. Stevens*, 458 F.2d 1205, 1209-10 (2nd Cir., 1971, cert denied, 409 US 889(1972)); see also *Bradley v. Fisher*, 80 US 335, 355 (1872). It is for this reason, among others, that this court has recognized the right to be heard in a meaningful way. See *Middlesex*.

The Special Referee found after hearing that the proof did not establish venality on the part of the Petitioner. Without an opportunity to appear before the Appellate Division, this critical factual determination was altered when the Appellate Division implicitly found venality, opining that Petitioner had failed to show lack of venality. In disciplinary matters, due process requires a reasonable opportunity to present a defense to the trier of fact. *In Re Ruffalo, supra.*

When the credibility of the Petitioner is involved a meaningful hearing should include the right to appear before the trier of fact so that it can observe his demeanor. See Judge Learned Hand in *Dyer v. Macdougall*, 201 F.2d 265, 268-269 (2nd Cir. 1952). No doubt, the Appellate Division's approach in altering the findings of fact played a role in the imposition of the serious penalty that was imposed. If the Appellate Division desired to make its own findings it had a duty to observe the bearing and the demeanor of Petitioner. That is the essence of fact finding.

The petitioner raised issues of fact having to do with lack of venality and mistake through mental exhaustion. He did not have the opportunity, either to have a

meaningful judicial hearing or the two proceedings provided for in the First Department before the matter reached the Court.

The explanation given for the fact that the Second Department provides abbreviated procedures is that expressed by Justice Krausman in his report on grievance procedures in the Appellate Division, Second Department dated June 30, 2004: "the opportunity to appear before the full grievance committee or a designate a sub committee prior to the authorization of a disciplinary proceeding . . . I do not find workable in the Second Department due to the high volume of complaints."

It has been a recurring theme of Bar Associations, special committees, law reviews, and law journal articles examining the attorney disciplinary system in New York that a uniform system of attorney discipline is needed. *See* Wechsler, Steven, "2001-2002 Survey of New York Law, Professional Responsibility" 53 Syracuse L. Rev. 737, 819 (2003); Caher, John, "State Bar Sidesteps Opening Discipline," N.Y.L.J. Jan. 28, 2002 at 1 ("instead of voting on a proposal to open proceedings . . .the House of Delegates on Friday substituted a resolution urging the adoption of uniform, statewide procedures and standards in disciplinary matters); N.Y. Prof'l Resp. Rep., March 2002, at 10; (House of Delegates of New York Bar Association "passed a resolution urging the adoption of uniform statewide discipline procedures."); Mangano, Guy James, "Attorney Discipline in Need of Change," N.Y.L.J. May 1, 2000 at 1 (. . .we should face the issue of whether our current method of attorney discipline, independently administered and enforced by each of the four departments

of the Appellate Division, lacks the degree of uniformity required of a modern legal system in the 21st Century.); Moore, Nancy J., "Lawyer Ethics Code Drafting in the Twenty-First Century," 30 Hofstra L. Rev. 923, 933 (Spring 2002); Levin, Leslie C., "The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanction," 48 Am. U. L. Rev. 1 (October 1998).

In particular, the Craco Committee recommended the adoption of a uniform standard for bringing formal charges stating that its proposed rules would "accommodate the need for uniformity of substance and diversity in local practice." Craco Committee Report, p. 49-51. Similarly, the Fales Task Force (The New York State Bar Association's Task Force on the Profession) as well as Rosiny's Committee (New York State Bar Association's Committee on Professional Discipline) both urged greater uniformity among the four judicial departments. *See* New York State Bar Association Committee on Professional Discipline Report, The State of Discipline in New York 1992, pp. 2, 3-4 (the system of professional discipline is "too complicated and varied to afford prompt, efficient and consistent handling of complaints. . . greater uniformity would seem to be indicated."); *See also,* New York State Bar Association Committee on Professional Discipline Reports 2001-2002, 2002-2003 (explaining differences that exist between departments); Report of the Commission on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century.* ABA Center for Professional Responsibility, 1992.

* * *

Separate treatment of attorneys in providing for two hearings and presentment to the Appellate Division in the First Department, as compared with one hearing and presentment to the Appellate Division in the Second Department cannot be sustained according to the traditional formulation requiring that classification bear a rational relationship to a legitimate governmental interest. *Lindsley v. Natural Carbonic Gas Co.*, 220 US 61, 78 (1911). It needs no citation of cases that liberty interests may not be taken away on a cost efficiency basis. Justice Krausman noted the difference in the procedures [protections] between the First and Second Departments, but explained the disparity solely on the ground that the Second Department had too high a volume of complaints. That is hardly of solace to one whose livelihood and reputation are at stake.

* * *

There is an additional infirmity to the right of equal protection aside from the difference already noted between the First Judicial Department and the Second Judicial Department, that being the procedures for disciplining attorneys as compared with other professionals, such as, doctors and dentists. The latter, as noted, are given the right to appear before a Hearing Panel [this is comparable to the right of an attorney to appear before the Special Referee.] If the decision is against the professional he/she has the right to appeal to the Board of Regents which reviews the decision of the Hearing Panel. [In the Second Department there is no such second level of review, but there is in the Appellate Division First Department.] Thereafter, as to said other professionals the Appellate

Division reviews decisions of the Board of Regents permitting briefing and the opportunity for oral argument. As to attorneys, neither department permits oral argument.

In the case of other professionals as noted, the Court reviews all questions of law and facts according to the "substantial evidence" standard. *Corwin v. Nyquist*, 37 AD2d 656,(3rd Dept. 1971). The disciplining of attorneys on the other hand is reviewed on the basis of whether there is "some evidence" which may be less than substantial, to justify the punishment meted out.

Unlike the State of New Jersey, New York does not have an automatic right of appeal to the Court of Appeals from a decision in either department with respect to any professional discipline. Compare: *Middlesex County Ethics Committee v. Garden State Bar Association, supra.*

* * *

New York courts do not permit oral argument in attorney disciplinary matters though they are characterized as "quasi-criminal." This court has declared unconstitutional New York's practice of permitting a court to deny counsel summation in a case tried without a jury. *Herring v. New York*, 422 US 853 (1975).

New York fails to provide a meaningful right of appeal to attorneys from the decision of the Appellant Division in either department. Although a State need not provide a right of appeal, once a State provides an appellate process, it may not arbitrarily deny an appeal, as it has done with attorneys in the Second Department, who are not

permitted an appeal from the decision of the Special Referee before the matter is submitted to the Appellate Division, or an appeal from the Appellate Division decision. *Griffin v. Illinois*, 351 US 12, 18 (1956). A most distinguished jurist, Justice Hopkins of the Appellate Division, Second Department, writing of judicial review opined: "the notion is firmly rooted that a litigant is entitled to at least one review of a final decision." The Role of an Intermediate Appellate Court, 41 Bklyn L.Rev. 459, 463 (1975).

CONCLUSION

The disciplinary procedures in New York, while entitled to deference, cannot so clearly violate principles of due process and equal protection. The cases are legion where attorneys have been at the forefront in arguing for the protection of constitutional rights. They must not be subjected in the Second Department to an abrogation of rights with there being an unreasonable distinction with those admitted to practice in the First Department and as to all attorneys, procedures as to discipline should not be fundamentally at odds with rights accorded to other professionals.

Accordingly, for all the foregoing reasons, petitioner respectfully urges this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,
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APPENDIX A

State of New York,

Court of Appeals

In the Matter of Claude Nelson Stuart, an attorney and counselor-at-law.
Grievance Committee for the Second and Eleventh Judicial Districts, Respondent;
Claude Nelson Stuart, Appellant.

May 11, 2006.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

APPENDIX B

Supreme Court of the State of New York

Appellate Division, Second Judicial Department

In the Matter of Claude Nelson STUART, an attorney and counselor-at-law.
Grievance Committee for the Second and Eleventh Judicial Districts, petitioner;
Claude Nelson Stuart, respondent.

Sept. 26, 2005.

PER CURIAM.

The petitioner served the respondent with a petition dated May 11, 2004, containing one charge of professional misconduct. After a pre-hearing conference on June 23, 2004, and a hearing on August 9, 2004, the Special Referee sustained the charge.

The petitioner now moves to confirm the Special Referee's report and to impose such discipline upon the respondent as the court deems necessary. The respondent has submitted an affirmation in opposition to the petitioner's motion, in which he requests that the court disaffirm the Special Referee's report and refer the matter back to the petitioner for the imposition of such discipline as it deems appropriate. Charge One alleges that the respondent gave false information to a Justice of the Supreme Court during a criminal homicide trial, in violation of Code of Professional Responsibility DR 1-102(A)(4), (5), (7) (22 NYCRR 1200.3 [a][4], [5], [7]).

In or about May 2002, the respondent, as an Assistant

District Attorney in Queens County, was the prosecutor in *People v. Johnson,* under Indictment No. 2002/00, before the Honorable Jaime A. Rios in the Supreme Court, Queens County. Prior to jury selection, defense counsel raised an issue regarding a potential *Brady* violation (*see Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215) in that he had not received a police report of a witness. The defense maintained that the witness's statements were exculpatory. On or about May 8, 2002, Justice Rios questioned the respondent about the whereabouts of the witness. The respondent informed the court that several attempts had been made to contact the witness at her last known address in Queens. The respondent indicated that attempts were underway to track the witness at a Manhattan residence but that she had not yet been located. On or about May 31, 2002, the respondent ascertained the whereabouts of the witness and met with her at her place of employment. On or about June 4, 2002, Justice Rios revisited the issue of the alleged *Brady* violation and inquired as to the witness's whereabouts. The respondent falsely indicated on the record that he still had no knowledge of her whereabouts.

Based on the evidence adduced, the Special Referee properly sustained the Charge. Accordingly, the petitioner's motion to confirm is granted.

In determining an appropriate measure of discipline to impose, the respondent asks the court to consider his record as an Assistant District Attorney in Queens County for more than 12 years and his handling of over 70 felony trials, the time he devotes to service for the Dix Hills United Methodist Church, his service in the United States Army JAG Corps Reserve, and his list of character witnesses,

including the respondent's military chaplain, his church pastor, professional and social acquaintances, and his wife, all of whom testified to his excellent reputation. In addition, the respondent presented character letters from two Justices of the Supreme Court, Queens County.

The respondent's prior disciplinary history consists of a Letter of Caution issued by the Grievance Committee for the Ninth Judicial District in 1999 for prosecutorial misconduct which resulted in this court's overturning a judgment of conviction (*see People v. Walters*, 251 A.D.2d 433, 674 N.Y.S.2d 114).

As a result of the respondent's misleading response to the court, the criminal matter had to be retried. Notwithstanding the respondent's claims that he lacked venality and the mitigation advanced, such conduct strikes at the heart of his credibility as a prosecutor and an officer of the court. As the Special Referee noted, the respondent had ample opportunity at the trial to correct or clarify his earlier false statement but opted not to do so. In essence, the respondent made a costly misrepresentation to the trial court which necessitated the retrial of the criminal action involving a major felony. Under the totality of circumstances, the respondent is suspended from the practice of law for a period of three years.

ORDERED that the petitioner's motion to confirm the report of the Special Referee is granted; and it is further,

ORDERED that the respondent, Claude Nelson Stuart, is suspended from the practice of law for a period of three

years, commencing October 26, 2005, and continuing until the further order of this court, with leave to the respondent to apply for reinstatement no sooner than six months prior to the expiration of the said three-year period upon furnishing satisfactory proof that during the said period he (a) refrained from practicing or *134 attempting to practice law, (b) fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10), and (c) otherwise properly conducted himself; and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this court, the respondent, Claude Nelson Stuart, shall desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

ORDERED that if the respondent, Claude Nelson Stuart, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent, Claude Nelson Stuart, shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10(f).

APPENDIX C

Supreme Court of the State of New York
Appellate Division, Second Judicial Department

In the Matter of Claude Nelson Stuart,
a suspended attorney

January 11, 2006

Motion by the respondent, inter alia, for leave to renew and/or reargue an opinion and order of this court dated September 26, 2005, or alternatively, for leave to appeal to the Court of Appeals from the opinion and order. In the opinion and order dated September 26, 2005, the respondent was suspended from the practice of law for a period of three years, commencing October 26, 2005, after a hearing before a Special Referee, who sustained one charge of professional misconduct alleging that the respondent gave false information to a Justice of the Supreme Court during a criminal trial. The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on January 18, 1989.

Upon the papers filed in support of the motion and the papers submitted in response thereto, it is

ORDERED, that the motion is denied.

APPENDIX D

Supreme Court of the State of New York
Appellate Division, Second Judicial Department

In the Matter of CLAUDE NELSON STUART, an attorney and counselor-at-law.
Grievance Committee for the Second and Eleventh Judicial Districts, petitioner;
Claude Nelson Stuart, respondent.

January 25, 2005

Pursuant to an Order of this Court, dated April 26, 2004, the undersigned has conducted a hearing in the above-entitled matter and submits the following report.

A pre-hearing conference was conducted on June 23, 2004, which was attended by the respondent CLAUDE NELSON STUART, his attorney JEROME KARP, ESQ. and counsel for the petitioner MELISSA BRODER, ESQ. at the Offices of the Grievance Committee for the Second and Eleventh Judicial Districts.

The hearing of the charges was held on August 9, 2004 with the same parties present.

The respondent is the subject of one charge alleging that he is guilty of professional misconduct as defined in the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department [22 NYCRR Section 691.2].

CHARGE ONE

It is alleged that the respondent gave false information to a judge during a criminal homicide trial and that by doing so violated Rule 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 102(A)(5) (engaging in conduct that is prejudicial to the Administration of Justice); and Rule 102(A)(7) (engaging in conduct that adversely reflects on the lawyers' fitness as a lawyer) of the Lawyer's Code of Professional Responsibility.

The undisputed and admitted facts are that the respondent, who was then an Assistant District Attorney in Queens County, was the prosecutor in the criminal homicide matter of *The People of the State of New York vs. Tyrone Johnson* before the Honorable Jaime A. Rios in the Supreme Court, Queens County. Prior to jury selection, defense counsel raised the issue of a Brady violation in that a police report concerning a witness, Shanese Knight, had not been received by him and that the statement may have been exculpatory. On May 8, 2002, in the course of an argument over the possible Brady violation and while considering defense counsel's requests, Justice Rios asked the following question:

> **THE COURT: Do the people know -- has anyone on the prosecution side been in contact with the witness?**
>
> **MR. STUART: Judge, since this morning I have - we have made several attempts in trying to locate this witness. Her last**

address was in Queens. She's no longer at that residence. Before I left I had information that they were being --tracking another residence in Manhattan for her and we continue to work on that, but right now as I stand here before you I cannot indicate to this Court that we have located her as of yet.

On or about Friday, May 31, 2002, the respondent learned where the witness resided and worked and met with her later that day at her place of employment. (T.80-84). On the previous day, the prosecution had rested its case and the matter had adjourned to Monday, June 3, 2002 for the defense's case.

On June 3, 2002, the defense presented one witness who contradicted the testimony of the prosecution's cooperating witness and may have jeopardized the prosecution if he had been believed. The respondent asked for and received a continuance to June 4, 2002 for the purpose of deciding whether he would present as a rebuttal witness. Shanese Knight could have been used as a rebuttal witness because the incident occurred across the street from her home and the defense witness claimed to have been inside that house at the time of the shooting. Her statement to the police would seem to have contradicted that testimony or at least not have supported it. On the evening of June 3rd the respondent tried to contact Ms. Knight at her home and place of employment without success. (T. 58)

On June 4, 2002, he presented a different rebuttal witness, one Kameesha Grant, whose name was used in the defense case and who successfully negated the defense witness' testimony. (T. 60-61) However, in the course of her testimony Ms. Grant stated that she had been in contact with Ms. Knight several weeks earlier. That information prompted defense counsel to again raise the Brady material question because if the prosecutor's witness knew of the whereabouts of Ms. Knight, then it would follow that the prosecutor must also know. He asked for a mistrial or alternatively a continuance so as to follow-up with the potential testimony of Ms. Knight. (X.5, P. 26-28)

During the colloquy concerning the renewed discussion fo the possible Brady violation, the following questions were asked by Justice Rios:

> **THE COURT: Do you have knowledge -- you indicated earlier, during the course of the trial, that you did not have any knowledge of Miss Shanese Knight's whereabouts?**
>
> **MR. STUART: That's correct, Judge. That's correct.**
>
> **THE COURT: And is that still your position?**
>
> **MR. STUART: Yes, Judge.**

There is no question but that at the time, the answers to Justice Rios' questions given by the respondent were false. Respondent first attributed the false statements to a narrow interpretation of the questions suggesting that the question concerned the whereabouts of the witness at that very moment and later suggesting that his answer was motivated by the fact that he believed that the witness was now trying to avoid him and didn't want to be located. (T.75) At the hearing of this charge, he suggests that upon reflection, his answers constituted a poor exercise of judgement. (T. 63-64)

The question which must be addressed now is whether the clearly false statement was intended to mislead the Court and thus constitute a violation of the respondent's obligations as an attorney or did it represent an unfortunate incident wherein false information was transmitted due to a momentary lapse of judgement during the pressure of trial and based on purely innocent motivations.

As noted previously, petitioner and respondent's counsel have submitted post hearing memoranda in which the issues are extensively argued. It appears to the undersigned, however, that the arguments of counsel go more to the issue of exacerbation or mitigation rather than to the basic issue of whether the respondent's answers to the Court were deliberately false and misleading.

Taken out of context and standing alone the question and answers could be viewed in the manner suggested by the respondent whether in his initial testimony with Grievance Committee staff or as suggested

in his testimony at the hearing. However a careful reading of the discussion with the Court by defense counsel and the respondent leads to the ultimate conclusion that the respondent had to have been aware that his response to the Court's inquiry about the whereabouts of the witness was false and misleading. Moreover, the colloquy which followed that exchange was so directly relevant to the questions asked by the Court that the respondent should have corrected any misconception during that exchange. The argument made during that discussion continually reverted to defense counsel's demand for information about Ms. Knight's location, yet the respondent continued to conceal the fact that he had contact with her just four days earlier. (Pet X.5, 29-30) Instead of at least correcting his earlier false statement or if it was mistaken one, clarifying it, the respondent argued that his office had no obligation to locate any witness for the defense. (Pet. X5, p. 30) That argument may have otherwise been a valid one but is at least disingenuous when he knew that he had moments before made a misleading and false statement to the court which could have been corrected promptly. He had ample opportunity to clear up any misunderstanding during that exchange but chose not to do so.

By fair preponderance of the credible evidence, I find that charge One is sustained.

MITIGATING FACTS

At the hearing of this charge it was established that the respondent has a good reputation in the general community and among many of his peers in the legal profession. Six character witnesses appeared on his behalf

(T. 10-40) and two letters were submitted for him by Justices of the Supreme Court. The revelation on cross examination of the letter of caution issued by the Grievance committee of the Ninth Judicial District and the decision of this Court in the matter of *The People of the State of New York v. Jay Walters* did not appear to me to effect that reputation among the witnesses.

It was established that the respondent is married with a family (T41). He was an Assistant District Attorney in Queens County for over 12 years, handling over 70 felony trials during his tenure. (T45-47) He is a Trustee of the Dix Hills United Methodist Church, and a guest organist and member of the choir there. (T24,27). Respondent also serves in the U.S. Army JAG Corp. Reserve and is the Command Judge Advocate of the 8th Medical Brigade. (T28–30).

Grievance Committee counsel argues with conviction that the respondent's record of a prior act of prosecutorial misconduct is a factor to be considered in searching for a motivation for the act complained of here. It is also argued that respondent had a case on his hands which was in serious trouble due to the unexpected testimony of the defense witness and at least the questionable status of the missing witness. It is also argued that the respondent's efforts to reach Shanese Knight on June 3rd were minimal at best and that he really wasn't looking for her and thus was motivated to maintain the fiction of her unavailability. While these arguments are attractive in establishing some motivation for misstatement, I believe that they are too speculative to attribute to respondent's lack of good faith.

Respondent's counsel emphasizes his candor in admitting that his previous narrow view of Justice Rios' question was an error and that upon reflection, he should have given a more detailed answer. It is argued that the ultimate fact was that the material allegedly withheld from the defense was not Brady material and that at the second trial of the matter Shanese Knight did testify favorably for the defense but that the defendant was nevertheless found guilty. It is claimed that given his experience as a prosecutor, the respondent genuinely felt that Knight was avoiding contact with him. Since he had no inkling that she was going to change her story he had no reason to lie about her availability.

While I agree with the respondent's position that the respondent may never had suspected that Shanese Knight might be an exculpatory witness and that no venality has been established by the evidence, I also am of the opinion that the respondent's explanation of his actions are not convincing. In particular, I find it disturbing that no attempt to correct or clarify his answer was made during the colloquy which followed the complained of false statement. There was ample opportunity during that time for him to set the record straight. If the pressure of the moment and the resultant inability of the respondent to clear the record was a problem, the explanation during these proceedings would have been helpful in understanding and accepting of the claimed error of judgment.

APPENDIX E

STATUTES AND RULES

28 U.S.C.A. 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

New York Civil Practice Law and Rules, §5601

(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:
1. from an order of the appellate division which finally determines an action where there is directly involved the

construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

New York Education Law §6510

In cases of professional misconduct the proceedings shall be as follows:

1. Preliminary procedures.

a. Complaint. A complaint of a licensee's professional misconduct may be made by any person to the education department.

b. Investigation. The department shall investigate each complaint which alleges conduct constituting professional misconduct. The results of the investigation shall be referred to the professional conduct officer designated by the board of regents pursuant to section sixty-five hundred six of this article. If such officer decides that there is not substantial evidence of professional misconduct or that further proceedings are not warranted, no further action shall be taken. If such officer, after consultation with a professional member of the applicable state board for the profession, determines that there is substantial evidence of professional misconduct, and that further proceedings are warranted, such proceedings shall be conducted pursuant to this section. If the complaint involves a question of professional expertise, then such officer may seek, and if so shall obtain, the concurrence of at least two members of a panel of three members of the applicable board. The department shall cause a preliminary review of every report made to the department pursuant to section twenty-eight hundred three-e as added by chapter eight hundred sixty-six of the laws of nineteen hundred eighty and sections forty-four hundred five-b of the public health law and three hundred fifteen of the insurance law, to determine if such report reasonably appears to reflect conduct warranting further investigation pursuant to this subdivision.

c. Charges. In all disciplinary proceedings other than those terminated by an administrative warning pursuant to paragraph a of subdivision two of this section, the department shall prepare the charges. The charges shall state the alleged professional misconduct and shall state concisely the material facts but not the evidence by which the charges are to be proved.

d. Service of charges and of notice of hearing. A copy of the charges and notice of any hearing pursuant to subdivision two or three of this section shall be served on the licensee personally by the department at least fifteen days before the hearing. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served by certified mail, return receipt requested to the licensee's last known address by the department at least twenty days before the hearing.

e. Records and reports as public information. In all disciplinary proceedings brought pursuant to this section or in any voluntary settlement of a complaint between the licensee and the department, the department shall notify the licensee in writing that the record and reports of such disciplinary proceeding or of such voluntary settlement shall be considered matters of public information unless specifically excepted in this article, or in any other law or applicable rule or regulation.

2. Expedited procedures.
a. Violations. Violations involving professional misconduct

of a minor or technical nature may be resolved by expedited procedures as provided in paragraph b or c of this subdivision. For purposes of this subdivision, violations of a minor or technical nature shall include, but shall not be limited to, isolated instances of violations concerning professional advertising or record keeping, and other isolated violations which do not directly affect or impair the public health, welfare or safety. The board of regents shall make recommendations to the legislature on or before June first, nineteen hundred eighty-one, for the further definition of violations of a minor or technical nature. The initial instance of any violation of a minor or technical nature may be resolved by the issuance of an administrative warning pursuant to paragraph b of this subdivision. Subsequent instances of similar violations of a minor or technical nature within a period of three years may be resolved by the procedure set forth in paragraph c of this subdivision.

b. Administrative warning. If a professional conduct officer, after consultation with a professional member of the state board, determines that there is substantial evidence of professional misconduct but that it is an initial violation of a minor or technical nature which would not justify the imposition of a more severe disciplinary penalty, the matter may be terminated by the issuance of an administrative warning. Such warnings shall be confidential and shall not constitute an adjudication of guilt or be used as evidence that the licensee is guilty of the alleged misconduct. However, in the event of a further allegation of similar misconduct by the same licensee, the matter may be reopened and further proceedings instituted as provided in this section.

c. Determination of penalty on uncontested minor violations. If a professional conduct officer, after consultation with a professional member of the state board, determines that there is substantial evidence of a violation of a minor or technical nature, and of a nature justifying a penalty as specified in this paragraph, the department may prepare and serve charges either by personal service or by certified mail, return receipt requested. Such charges shall include a statement that unless an answer is received within twenty days denying the charges, the matter shall be referred to a violations committee consisting of five members of the state board for the profession, at least one of whom shall be a public representative for determination. The violations panel shall be appointed by the executive secretary of the state board. The licensee shall be given at least fifteen days notice of the time and place of the meeting of the violations committee and shall have the right to appear in person and by an attorney and to make a statement to the committee in mitigation or explanation of the misconduct. The department may appear and make a statement in support of its position. The violations committee may issue a censure and reprimand, and in addition, or in the alternative, may impose a fine not to exceed five hundred dollars for each specification of minor, or technical misconduct. If the fine is not paid within three months the matter may be reopened and shall be subject to the hearing and regents decision procedures of this section. The determination of the panel shall be final and shall not be subject to the regents decision procedures of this section. If an answer is filed denying the charges, the matter shall be processed as provided in subdivision three of this section.

d. Convictions of crimes or administrative violations. In cases of professional misconduct based solely upon a violation of subdivision five of section sixty-five hundred nine of this article, the professional conduct officer may prepare and serve the charges and may refer the matter directly to a regents review committee for its review and report of its findings, determination as to guilt, and recommendation as to the measure of discipline to be imposed. In such cases the notice of hearing shall state that the licensee may file a written answer, brief and affidavits; that the licensee may appear personally before the regents review committee, may be represented by counsel and may present evidence or sworn testimony on behalf of the licensee, and the notice may contain such other information as may be considered appropriate by the department. The department may also present evidence or sworn testimony at the hearing. A stenographic record of the hearing shall be made. Such evidence or sworn testimony offered at the meeting of the regents review committee shall be limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. The presiding officer at the meeting of the regents review committee may, in his or her discretion, reasonably limit the number of witnesses whose testimony will be received and the length of time any witness will be permitted to testify. In lieu of referring the matter to the board of regents, the regents review committee may refer any such matter for further proceedings pursuant to paragraph b or c of this subdivision or subdivision three of this section.

3. Adversary proceedings. Contested disciplinary proceedings and other disciplinary proceedings not resolved pursuant to subdivision two of this section shall be tried

before a hearing panel of the appropriate state board as provided in this subdivision.

a. Notice of hearing. The department shall set the time and place of the hearing and shall prepare the notice of hearing. The notice of hearing shall state (1) the time and place of the hearing, (2) that the licensee may file a written answer to the charges prior to the hearing, (3) that the licensee may appear personally at the hearing and may be represented by counsel, (4) that the licensee shall have the right to produce witnesses and evidence in his behalf, to cross-examine witnesses and examine evidence produced against him, and to issue subpoenas in accordance with the provisions of the civil practice law and rules, (5) that a stenographic record of the hearing will be made, and (6) such other information as may be considered appropriate by the department.

b. Hearing panel. The hearing shall be conducted by a panel of three or more members, at least two of whom shall be members of the applicable state board for the profession, and at least one of whom shall be a public representative who is a member of the applicable state board or of the state board for another profession licensed pursuant to this title. The executive secretary for the applicable state board shall appoint the panel and shall designate its chairperson. After the commencement of a hearing, no panel member shall be replaced. A determination by the administrative officer of a need to disqualify or remove any panel member will result in the disqualification or removal of the panel and cause a new panel to be appointed. In addition to said panel members, the department shall designate an administrative officer, admitted to practice as an attorney in the state of New York, who shall have the authority to rule on all

motions, procedures and other legal objections and shall draft a report for the hearing panel which shall be subject to the approval of and signature by the panel chairperson on behalf of the panel. The administrative officer shall not be entitled to a vote.

c. Conduct of hearing. The evidence in support of the charges shall be presented by an attorney for the department. The licensee shall have the rights required to be stated in the notice of hearing. The panel shall not be bound by the rules of evidence, but its determination of guilt shall be based on a preponderance of the evidence. A hearing which has been initiated shall not be discontinued because of the death or incapacity to serve of one member of the hearing panel.

d. Results of hearing. The hearing panel shall render a written report which shall include (1) findings of fact, (2) a determination of guilty or not guilty on each charge, and (3) in the event of a determination of guilty, a recommendation of the penalty to be imposed. For the panel to make a determination of guilty, a minimum of two of the voting members of the panel must vote for such a determination. A copy of the report of the hearing panel shall be transmitted to the licensee.

4. Regents decision procedures.

a. Regents review committee. The transcript and report of the hearing panel shall be reviewed at a meeting by a regents review committee appointed by the board of regents. The regents review committee shall consist of three members, at least one of whom shall be a regent.

b. Regents review committee meetings. The review shall be based on the transcript and the report of the hearing panel. The licensee may appear at the meeting, and the regents review committee may require the licensee to appear. The licensee may be represented by counsel. The department shall notify the licensee at least seven days before the meeting (1) of the time and place of the meeting, (2) of his right to appear, (3) of his right to be represented by counsel, (4) whether or not he is required to appear, and (5) of such other information as may be considered appropriate. After the meeting, the regents review committee shall transmit a written report of its review to the board of regents. In cases referred directly to the regents review committee pursuant to paragraph d of subdivision two of this section, the review shall be based upon the charges, the documentary evidence submitted by the department, any answer, affidavits or brief the licensee may wish to submit, and any evidence or sworn testimony presented by the licensee or the department at the hearing, pursuant to the procedures described by paragraph d of subdivision two of this section.

c. Regents decision and order. The board of regents (1) shall consider the transcript, the report of the hearing panel, and the report of the regents review committee, (2) shall decide whether the licensee is guilty or not guilty on each charge, (3) shall decide what penalties, if any, to impose as prescribed in section sixty-five hundred eleven of this article, and (4) shall issue an order to carry out its decisions. Such decisions shall require the affirmative vote of a majority of the members of the board of regents. If the board of regents disagrees with the hearing panel's determination of not guilty, it shall remand the matter to

the original panel for reconsideration or to a new panel for a new hearing. The panel's determination of not guilty on reconsideration or a new hearing shall be final. The order shall be served upon the licensee personally or by certified mail to the licensee's last known address and such service shall be effective as of the date of the personal service or five days after mailing by certified mail. The licensee shall deliver to the department the license and registration certificate which has been revoked, annulled, suspended, or surrendered within five days after the effective date of the service of the order. If the license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, the licensee shall submit an affidavit to that effect, and shall deliver such license or certificate to the department when located.

5. Court review procedures. The decisions of the board of regents may be reviewed pursuant to the proceedings under article seventy-eight of the civil practice law and rules. Such proceedings shall be returnable before the appellate division of the third judicial department, and such decisions shall not be stayed or enjoined except upon application to such appellate division after notice to the department and to the attorney general and upon a showing that the petitioner has a substantial likelihood of success.

6. The provisions of subdivisions one through four of this section shall not be applicable to proceedings in cases of professional misconduct involving the medical profession, except as provided in paragraph m of subdivision ten of section two hundred thirty of the public health law.

7. Notwithstanding any other provision of law, persons who assist the department as consultants or expert witnesses in

the investigation or prosecution of alleged professional misconduct, licensure matters, restoration proceedings, or criminal prosecutions for unauthorized practice, shall not be liable for damages in any civil action or proceeding as a result of such assistance, except upon proof of actual malice. The attorney general shall defend such persons in any such action or proceeding, in accordance with section seventeen of the public officers law.

8. The files of the department relating to the investigation of possible instances of professional misconduct, or the unlawful practice of any profession licensed by the board of regents, or the unlawful use of a professional title or the moral fitness of an applicant for a professional license or permit, shall be confidential and not subject to disclosure at the request of any person, except upon the order of a court in a pending action or proceeding. The provisions of this subdivision shall not apply to documents introduced in evidence at a hearing held pursuant to this chapter and shall not prevent the department from sharing information concerning investigations with other duly authorized public agencies responsible for professional regulation or criminal prosecution.

New York Judiciary Law §90

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney

and counsellor-at-law and has satisfied the requirements of section 3-503 of the general obligations law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court, if it shall be satisfied that such person is currently admitted to the bar in such other jurisdiction or jurisdictions, that at least one such jurisdiction in which he is so admitted would similarly admit an attorney or counsellor-at-law admitted to practice in New York state to its bar without examination and that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law and has satisfied the requirements of section 3-503 of the general obligations law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys. Such application, which shall conform to the requirements of section 3-503 of the general obligations law, shall be submitted to the appellate division of the supreme court in the department specified in the rules of the court of appeals.

c. The members of the committee appointed by the appellate division in each department to investigate the character and fitness of applicants for admission to the bar, shall be entitled to their necessary traveling, hotel and other expenses, incurred in the performance of their duties, payable by the state out of moneys appropriated therefor, upon certificate of the presiding justice of the appellate division by which such committee is appointed.

d. The committee on character and fitness appointed by the appellate division of the supreme court in the first judicial department and the committee on character and fitness appointed by the appellate division of the supreme court of the second judicial department, may each, with the written consent of the justices of each of such appellate divisions or a majority of such justices, acting for their respective appellate divisions, from time to time, appoint and remove a secretary, stenographers and assistants, and procure a suitable office for each committee, properly furnished and equipped and all books, stationery, blanks, postal cards, expressage and postage stamps as shall be required for the proper performance of the duties of each such committee.

e. The salaries of such secretary, stenographers and assistants shall be fixed for each department by the justices of the appellate division in each department or a majority of them in each department.

f. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the first judicial department, shall, in the said first judicial department, be paid by the comptroller of the city of New York.

g. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the second judicial department shall be certified by the presiding justice of such department to the state comptroller who shall audit the same. The state department of taxation and finance shall pay such salaries and expenses and shall apportion the same among the counties comprising the second judicial department. Such counties shall reimburse the state for such compensation. The time and method of such apportionment and the time and method of such reimbursement shall be as specified in section seventy-four of this chapter.

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent,

clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor- at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

2-a. a. The provisions of this subdivision shall apply in all cases of an attorney licensed, registered or admitted to practice in this state who has failed after receiving appropriate notice, to comply with a summons, subpoena or warrant relating to a paternity or child support proceeding involving him or her personally, or who is in arrears in

payment of child support or combined child and spousal support which matter shall be referred to the appropriate appellate division by a court pursuant to the requirements of section two hundred forty-four-c of the domestic relations law or pursuant to section four hundred fifty-eight-b or five hundred forty-eight-b of the family court act.

b. Upon receipt of an order from the court based on arrears in payment of child support or combined child and spousal support pursuant to one of the foregoing provisions of law, the appropriate appellate division within thirty days of receipt of such order, if it finds such person to be so licensed, registered or admitted, shall provide notice to such attorney of, and initiate, a hearing which shall be held by it at least twenty days and no more than thirty days after the sending of such notice to the attorney. The hearing shall be held solely for the purpose of determining whether there exists as of the date of the hearing proof that full payment of all arrears of support established by the order of the court to be due from the licensed, registered or admitted attorney have been paid. Proof of such payment shall be a certified check showing full payment of established arrears or a notice issued by the court or the support collection unit where the order is payable to the support collection unit designated by the appropriate social services district. Such notice shall state that full payment of all arrears of support established by the order of the court to be due have been paid. The licensed attorney shall be given full opportunity to present such proof of payment at the hearing in person or by counsel. The only issue to be determined as a result of the hearing is whether the arrears have been paid. No evidence with respect to the appropriateness of the court order or ability of the respondent party in arrears to

comply with such order shall be received or considered by the disciplinary committee.

c. Upon receipt of an order from the court based on failure to comply with a summons, subpoena, or warrant relating to a paternity or child support proceeding, the appropriate appellate division within thirty days of receipt of such order, if it finds such person to be so licensed, registered or admitted, shall provide notice to such attorney that his or her license shall be suspended within sixty days of such notice to the attorney unless the conditions in paragraph e of this section are met.

d. Notwithstanding any inconsistent provision of this section or of any other provision of law to the contrary, the license to practice law in this state of an attorney admitted to practice shall be suspended by the appellate division if, at the hearing provided for by paragraph b of this subdivision, the licensed attorney fails to present proof of payments as required by such subdivision. Such suspension shall not be lifted unless the original court or the support collection unit, where the court order is payable to the support collection unit designated by the appropriate social services district, issues notice to the appellate division that full payment of all arrears of support established by the order of the original court to be due have been paid.

e. Notwithstanding any inconsistent provision of this section or of any other provision of law to the contrary, the license of an attorney admitted to practice law in this state shall be suspended by the appellate division, in accordance with paragraph c of this subdivision unless the court terminates its order to commence suspension proceedings. Such

suspension shall not be lifted unless the court issues an order to the appellate division terminating its order to commence suspension proceedings.

f. The appellate division shall inform the original court of all actions taken hereunder.

g. This subdivision two-a applies to paternity and child support proceedings commenced under, and support obligations paid pursuant to any order of child support or child and spousal support issued under provisions of section two hundred thirty-six or two hundred forty of the domestic relations law, or article four, five, five-A or five-B of the family court act.

h. Notwithstanding any inconsistent provision of this section or of any other provision of law to the contrary, the provisions of this subdivision two-a shall apply to the exclusion of any other requirements of this section and to the exclusion of any other requirement of law to the contrary.

3. The suspension or removal of an attorney or counsellor-at-law, by the appellate division of the supreme court, operates as a suspension or removal in every court of the state.

4. a. Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

b. Whenever any attorney and counsellor-at-law shall be convicted of a felony as defined in paragraph e of this subdivision, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

c. Whenever an attorney shall be convicted of a crime in a court of record of the United States or of any state, territory or district, including this state, whether by a plea of guilty or nolo contendere or from a verdict after trial or otherwise, the attorney shall file, within thirty days thereafter, with the appellate division of the supreme court, the record of such conviction.

The failure of the attorney to so file shall be deemed professional misconduct provided, however, that the appellate division may upon application of the attorney, grant an extension upon good cause shown.

d. For purposes of this subdivision, the term serious crime shall mean any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

e. For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.

f. Any attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction until a final order is made pursuant to paragraph g of this subdivision.

Upon good cause shown the appellate division of the supreme court may, upon application of the attorney or on its own motion, set aside such suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice.

g. Upon a judgment of conviction against an attorney becoming final the appellate division of the supreme court shall order the attorney to show cause why a final order of suspension, censure or removal from office should not be made.

h. If the attorney requests a hearing, the appellate division of the supreme court shall refer the proceeding to a referee, justice or judge appointed by the appellate division for hearing, report and recommendation.

After said hearing, the appellate division may impose such discipline as it deems proper under the facts and circumstances.

5. a. If such removal or debarment was based upon conviction for a serious crime or upon a felony conviction as defined in subdivision four of this section, and such felony conviction was subsequently reversed or pardoned by the president of the United States, or governor of this or another state of the United States, the appellate division shall have power to vacate or modify such order or debarment, provided, however, that if such attorney or counsellor-at-law has been removed from practice in another jurisdiction, a pardon in said jurisdiction shall not be a basis for application for re-admission in this jurisdiction unless he shall have been readmitted in the jurisdiction where pardoned.

b. If such removal or debarment was based upon conviction for a felony as defined in subdivision four of this section, the appellate division shall have power to vacate or modify such order or debarment after a period of seven years provided that such person has not been convicted of a crime during such seven-year period.

c. An attorney and counsellor-at-law who has been convicted of a felony without the state and whose name has been struck from the roll of attorneys prior to July thirteenth, nineteen hundred seventy-nine by virtue of the provisions of subdivision four of this section may, if he alleges that such felony committed without the state would not constitute a felony if committed within the state, petition the appellate division to vacate or modify such debarment. If the appellate division finds that the felony of which the

attorney and counsellor-at-law had been convicted without the state would not constitute a felony if committed within the state, it shall grant a hearing and may retroactively vacate or modify such debarment and impose such discipline as it deems just and proper under the facts and circumstances.

The attorney and counsellor-at-law shall petition for reinstatement by filing in the appellate division a copy of the order of removal together with a request for a hearing pursuant to the provisions of this paragraph. Upon such application, the order of removal shall be deemed an order of suspension for the purposes of a proceeding pursuant to this paragraph.

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such

presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid out of funds appropriated to the office of court administration for that purpose.

6-a. a. Where the appellate division of supreme court orders the censure, suspension from practice or removal from office of an attorney or counsellor-at-law following disciplinary proceedings at which it found, based upon a preponderance of the legally admissible evidence, that such attorney or counsellor-at-law wilfully misappropriated or misapplied money or property in the practice of law, its order may require him or her to make monetary restitution in accordance with this subdivision. Its order also may require that he or she reimburse the lawyers' fund for client protection of the state of New York for awards made to the person whose money or property was wilfully misappropriated or misapplied.

b. Monetary restitution, as authorized hereunder, shall be made to the person whose money or property was wilfully misappropriated or misapplied and shall be for the amount or value of such money or property, as found in the disciplinary proceedings. In the event that such person dies prior to completion of such restitution, any amount

remaining to be paid shall be paid to the estate of the deceased.

c. Any payment made as restitution pursuant to this subdivision shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment; nor shall any order of the appellate division made hereunder deprive a criminal court of any authority pursuant to article sixty of the penal law.

d. An order issued pursuant to this subdivision may be entered as a civil judgment. Such judgment shall be enforceable as a money judgment in any court of competent jurisdiction by any person to whom payments are due thereunder, or by the lawyers' fund for client protection where it has been subrogated to the rights of such person.

e. Where an attorney or counsellor-at-law is permitted to resign from office, the appellate division may, if appropriate, issue an order as provided herein requiring him or her to make payments specified by this subdivision.

f. Notwithstanding any other provision of this subdivision, no order may be issued hereunder unless the person required to make payments under such order first is given an opportunity to be heard in opposition thereto.

7. In addition to the duties prescribed by section seven hundred of the county law, it shall be the duty of any district attorney within a department, when so designated by the justices of the appellate division of the supreme court in such department, or a majority of them, to prosecute all proceedings for the removal or suspension of attorneys and

counsellors-at-law or the said justices, or a majority of them may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings and, during or upon the termination of the investigation or proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered, which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein, subject to the limitations prescribed by section three of article six of the constitution of this state.

9. No objection shall be taken to the appointment of any member of the bar to act as referee or judge in a disciplinary proceeding under this section on the ground that he is a member of a bar association or other corporation or association which is the petitioner therein.

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having

jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

APPENDIX F

CHART REFLECTING NO BRADY VIOLATIONS

February 6, 2000	May 31, 2002
Knight interview	Knight interview
By Detective Bardin	By Detectives Cooper, Beisel, and Stewart
DID NOT WITNESS MURDER Knight in her living room, front of residence watching television, could not sleep. She looked out of the window and observed the victim drive up to his house, exit and approach the front gate. She observed "Perp 1" walk toward victim and the two appeared to talk. Knight left living room at 3:05 a.m., went to her bedroom, rear of the house and watched TV.	DID NOT WITNESS MURDER Knight confirms that she did not witness the murder.

February 6, 2000	May 31, 2002
At 3:16 a.m., Knight heard one gunshot she believed came from the vicinity of 113th Avenue. Knight lowered her TV and then heard two more gunshots. **NO HEIGHT DESCRIPTION**	**NO HEIGHT DESCRIPTION**